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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

A. D. WOODARD AND
OKLAHOMA FURNITURE MFG. CO. ____ *Petitioners*

v. No. 853

LEWIS M. ROBINSON, WM. M. BERRY
AND JAMES MALONE, COMPOSING THE
ARKANSAS PUBLIC SERVICE COMMISSION ____ *Respondents*

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE
SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The decision of the Supreme Court of Arkansas dated December 10, 1956, appears in the Petition at pages 26-32.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether it is an undue burden on interstate commerce to require a contract carrier to obtain a State permit.

STATUTORY PROVISIONS INVOLVED

The pertinent Federal statutory provisions are the Federal Motor Carrier Act, Part II, Interstate Commerce Act, 49 USCA, Section 303(a) (15), and (17) which appear in the Petition at page 34. The State legislation involved is the Arkansas Motor Carrier Act of 1955, being Act 397 of 1955; Section 3; Section 4; Section 5(a) (7), (8), (9), (14), (19); Section 6(a) (1), (2), (3); Section 1(a); Section 22(a) and (b); and part of Section 25, which appears in the Petition at pages 34-37.

STATEMENT

On May 16, 1955, proper officials of the Respondents, Arkansas Public Service Commission, stopped a truck in West Memphis, Arkansas, owned and operated by Petitioner, A. D. Woodard, hereinafter referred to as Woodard. The truck was being operated from Granada, Mississippi, through the State of Arkansas to Oklahoma City, Oklahoma, and contained merchandise being delivered to Petitioner, Oklahoma Furniture Manufacturing Company, hereinafter referred to as Company. The lease is set forth in the Appendix.

After examining this lease, the enforcement officers arrested Woodard for violation of Act 397 of 1955 in that Woodard did not hold a permit or certificate of convenience and necessity from the Arkansas Public Service Commission.

On May 27, 1955, the Petitioners herein filed a complaint for a declaratory judgment and restraining order against Respondents. On April 17, 1956, the Pulaski Chancery Court entered its decree finding that the petitioner, Oklahoma Furniture Manufacturing Company was a bona fide private carrier and that Petitioner Woodard was not a "motor carrier" under Act 397 of 1955 of the Arkansas

Statutes under his "equipment lease agreement" with the Company. The Court permanently enjoined Respondents from interfering in any way with either of the Petitioners or any other "lessor-driver" under similar leases with the Company in the transportation of the Company's merchandise in interstate commerce through Arkansas.

The decree of the Pulaski Chancery Court was appealed to the Arkansas Supreme Court. On December 10, 1956, the Arkansas Supreme Court delivered an opinion reversing the lower Court. This decision can be found at pages 26-32 of the Petition. The Supreme Court held that the Petitioner Woodard was operating in violation of Acts 367 of 1941 and 397 of 1955, and further that Act 397 did not unduly burden interstate commerce nor did it invade a field preempted by the Federal Motor Carrier Act.

ARGUMENT

The issue in the present case is uniquely narrow and under no interpretation can it be converted into one warranting review by this Court on certiorari. This matter only involves one shipper and one manufacturer who admit that their circumstances are peculiarly different from others in the industry. On the facts presented, the Supreme Court of the State of Arkansas was manifestly correct in its interpretation. There is no asserted conflict of decision nor in line of the legislative history of the Statutes involved could any other result have been reached. There is no important question of Federal law requiring decision by this Court.

I

THE DECISION BELOW IS CLEARLY CORRECT

The Arkansas Supreme Court was correct in holding that Woodard was a contract carrier and that no undue burden on interstate commerce was created in requiring him merely to secure a permit to operate as such. In *Fry Roofing Co.* v. *Wood,* 344 U.S. 157, 97 L. Ed. 168, 73 S. Ct. 204, this Court held that in the absence of exceptional circumstances, findings of a state court will be accepted by the Supreme Court of the United States, where, though the evidence is conflicting, the findings are not without factual foundation.

The Arkansas Supreme Court holding was based on ample factual foundation and pursuant to the applicable State and Federal Statutes. In finding that Woodard was operating as a contract carrier, the Court pointed to the following uncontroverted facts which proved that, under the terms of the agreement entered into between the manufacturing company and Woodard, a relationship of contract carrier existed:

1. Woodard was the owner of the transportation equipment.

2. The consideration given to Woodard was based on fourteen or fifteen cents per mile, which included compensation for use of the equipment, and all expenses including compensation for the driver.

3. Woodard was required to keep a mileage report which the company had the right to audit.

4. The equipment was to be operated only by Woodard or in the event of illness or disability to be operated by someone secured by him and subsequently approved by the Company.

5. Woodard was obligated to pay all operation costs including the cost of gasoline, oil, grease, repairs, maintenance, anti-freeze and such other costs as might be incident to the operation and maintenance of the equipment.

6. Woodard was obligated to keep the equipment in first-class operating condition.

7. The company is not liable to Woodard for wear, tear and depreciation on the equipment, nor is it liable for damage caused by accident, theft or fire.

8. Woodard, at his own expense, was required to procure Oklahoma Commission license plates.

9. In the event Woodard used a Company trailer in connection with his own equipment, he was liable to the extent of $250.00 for any damage other than wear and depreciation.

Other uncontroverted facts which also reflected conclusively that Woodard was a contract carrier are:

1. Paragraph 12 of the agreement provided that Woodard would comply with the Workmens Compensation Law with respect to any person employed by him, and should pay social security tax for any employee, or for himself as a self-employed person, and should pay the necessary premiums for compensation insurance.

2. Paragraph 13 provides that Woodard is responsible for securing necessary permits and certificates.

3. Paragraph 12 provides that the Company would not carry collision, fire, theft or any other type of insurance for the account of Woodard and if he carried such insurance, it would be at his sole cost.

The agreement itself provides in Section 19 that it was to take immediate effect and supersede all prior written or verbal agreements and was to remain in force until terminated. There was no testimony that the agreement had been terminated, nor was there any testimony that operations existed contrary to this agreement. In fact, Woodard and representatives of the Company all testified that their understanding was fully set out in the agreement and was followed by all concerned (T.96, T.104).

The theory upon which the petitioners case is based is that Woodard was an employee of the Company as well as the lessor of the equipment used by the Company. In their brief, they refer to him as "Lessor-Employee". They do not contend that the alleged relationship "Lessor-Employee" was based on an understanding other than the agreement that has been referred to. The facts upon which the Supreme Court of Arkansas based its decision are not controverted by the petitioners. The Supreme Court

was correct in holding that these facts create a relationship of carrier-shipper between Petitioners.

Petitioners also contend that the Supreme Court of Arkansas erred in requiring Woodard to obtain a State permit because the applicable Arkansas statutes requiring the permit for the Arkansas Supreme Court decision enforcing it was an undue burden on interstate commerce. Petitioners do not contend that the State of Arkansas has abused any discriminatory right, or that it has refused to grant such permit; nor, is there any showing that the State has attempted, or will attempt, to attach any onerous burden to the granting of a permit or impose conditions that conflict with either the National Motor Carrier Act or Interstate Commerce Commission regulations. This honorable Court in the case of *Fry Roofing Co.* v. *Wood*, 244 U.S. 157, 97 L. Ed. 168, 73 S. Ct. 204, previously passed upon the identical Arkansas Statutes and their application under substantially similar situations as involved here. In affirming a decision of the Arkansas Supreme Court, this Court there said:

> "The finding that the arrested drivers own and operated the trucks for hire makes them contract carriers as defined in the state Act. Section 11 of that Act requires contract carriers to get a permit and outlines certain considerations the state commission may weigh in granting or refusing the permit. Among these matters is the adequacy of transportation services already being performed by 'any railroad, street railway or motor carrier'. Refusal of a state certificate based on such grounds was held to be an unconstitutional obstruction of interstate commerce in *Buck* v. *Kuykendall*, 267 U.S. 307, 69 L. Ed. 623, 45 S. Ct. 324, 38 A.L.R. 286. To deny these interstate carriers an Arkansas permit for such reasons would conflict with the Buck holding.

"Unlike the situation in the Buck case, Arkansas has not refused to grant a permit for interstate carriage of goods on state highways. *It has asked these driver-owners to do nothing except apply for a permit as contract carriers are required to do by the state Act.* And the State Commission here expressly disclaims any 'discretionary right to refuse to grant a permit for contract carriage where that carriage is in interstate commerce'. The state asserts no power or purpose to require the drivers to do more than register with the appropriate agency. Such an identification is necessary, the Commission urges, in order that it may properly apply the state's valid police, welfare, and safety regulations to motor carriers using its highways. Nor is there any showing whatever that the Commission has attempted or will attempt to attach any burdensome conditions to the grant of a permit, or conditions that would in any manner conflict with the National Motor Carrier Act or any Interstate Commerce Commission regulations issued thereunder. Moreover, the Arkansas Act imposes upon its Commission the duty of reconciling state regulation with that of the Interstate Commerce Commission, just as the Interstate Commerce Act requires federal officials to cooperate with the states and their duly authorized state officials. Here neither petitioner nor the drivers have obtained any kind of authority from the Interstate Commerce Commission. Indeed, petitioner's whole case has been built on the premise that neither it nor the drivers must get a permit from the state or the national regulatory agency. In this situation our prior cases make clear that a state can regulate so long as no undue burden is imposed on interstate commerce, and that a mere requirement for a permit is not such a burden. It will be time enough to consider apprehended burdensome conditions when and if the state attempts to impose and enforce them. At present we hold only that Arkansas is not powerless to require interstate motor carriers to identify themselves as users of that state's highways.

"Affirmed." (Emphasis added.)

As was pointed out in the *Fry case*, there is no showing in the case at bar that the Commission has attempted or will attempt to attach any burdensome conditions to the grant of a permit, or conditions that would in any manner conflict with National Motor Carrier Act or any interstate commerce commission regulations issued thereunder.

The Supreme Court of Arkansas was clearly correct in finding that the relationship of contract carrier and shipper existed, and that the regulatory measure here imposed in no wise amounted to a burden upon Interstate Commerce.

II

THERE IS NO CONFLICT OF DECISION

The Petitioners do not contend that the Arkansas Supreme Court erred in finding Woodard to be a contract carrier under the State Law, but that the Court erred in not applying the Federal Law. On page 16 of their Brief they state the tests for determining whether or not the Company was a private carrier. They cite no authority to the effect that these tests are conclusive or that they are the only tests that are applied by Federal Law. The first test (*I. C. C.* v. *Tank Car Oil Corp.*, 151 Fed. (2) 834) provides that if a person is transporting his own property he is a private carrier and not a contract carrier. This test is not in conflict with those used by the Arkansas Supreme Court, however, the Arkansas Supreme Court found that the person doing the transporting (Woodard) did not own the property transported, and this is uncontroverted. The second test (*Brooks Transport Co.* v. *U. S.*, 93 Fed. Sup. 517, aff. 340 U.S. 925, 95 L. Ed. 688, 715, C. 501), applied by the Petitioners, is, to the effect, that if it is established that the primary business of a con-

cern is the manufacturer or sole owner of goods which concerns transportation it is a private carrier. This test is not in conflict with the holding of the Arkansas Supreme Court for the reason that the Court held Woodard was transporting goods belonging to the Company and as such was a contract carrier. The Third test (*I.C.C.* v. *F. & F. Truck Leasing Co.* [1948] 78 Fed. Sup. 13, 20), applied, concerns whether or not the shipper, which in this case would be the Company, exercises control and responsibility over the operations of the vehicles such as would be exercised by it if it were the owner of the vehicle. In other words, if the operations were the same as they would have been if the Company had owned the trucks, then it would be that of a private carrier. This test is not in conflict with the finding of the Arkansas Supreme Court. That Court pointed out uncontroverted facts which reflected circumstances that would not have existed if the vehicle had been owned by the Company in a bona fide operation. Some of these are as follows:

1. The consideration paid Woodard was based upon a lump sum and included payments for oil, gas, and other operating expenses, and alleged wages.

2. The operator of a truck was required to hire his own substitute in the evenf of illness.

3. Woodard paid all cost of maintenance, and was required to keep the equipment in first-class operating condition.

4. Woodard was required to pay for his own liability insurance, collision, fire and other types of insurance.

5. Woodard had to procure and pay for license plates and permits and if he did damage to any

equipment owned by the Company, was required to pay for the damage to the extent of $250.00.

In addition to these facts pointed out by the Arkansas Supreme Court, it should be noted that the driver was required to comply with the Workmens Compensation Law with respect to any substitute drivers; pay Social Security Tax for himself and any substitute driver; and to pay selfemployment tax. Surely it can be said, in view of these facts, that this operation was not the same as it would have been if the vehicle had been owned by the Company and Woodard a true employee. In fact, the very reasons given by the Company for entering into this Lessor-lessee agreement was that it wanted to change its relations with respect to its drivers. Furthermore, with respect to test No. 3 promulgated by the petitioners, the case they cite as support for this test, *Interstate Commerce Commission* v. *F. & F. Truck Leasing Co.*, (1948) 78 Fed. Sup. 13, held on facts almost identical with the present case, that the alleged owner-operator was, in fact, a contract carrier. The case at the bar contains facts which indicate even more the relationship of contract carrier than those in the *F. & F. Case*, such as the compensation paid the owner-operator was 4½c per mile as wages, while the rental for the equipment was based upon a different formula. In other words, alleged wages and rental were not lumped into a single payment as in the case at bar. Also the Company in the *F. & F. Case* paid Social Security and with-holding tax deduction. In the case at the bar, this was not done. It should be noted that the *F. & F. Case* contained language cited from the *Motor Haulage Co., Inc.* v. *U. S. et al*, 70 Fed. Sup. 17 (affirmed 331 US 784) equally applicable here, which is as follows:

> "... The real issue to be decided is whether under this particular statute the commission was right in holding, even with respect to contracts without responsibility, that 'plaintiff is a person which,

> under individual contracts or agreements, engages in the transportation * * * by motor vehicle of passengers or property in interstate or foreign commerce for compensation" (Interstate Commerce Act, part II, sec. 203 [a] [15]). We emphasize that we are not speaking of cases where plaintiff merely furnishes the equipment, and the drivers are supplied by the shippers: the commission clearly decided that plaintiff was not a common carrier where such operations are concerned (46 M. C. C. 116). We are speaking of a case where the plaintiff furnishes not only the vehicle but the driver, is compensated on a mileage or time basis, pays the hire and other incidental expenses of the driver, agrees to maintain the leased equipment in good order and repair, to carry insurance, and to garage and fuel the trucks, but does not specifically undertake to transport cargo or to be responsible for loss or damage. . . ."

On page 17 of Petitioner's brief, the Court's attention is called to *Watson Mfg. Co., Inc., Common Carrier Application*, 51 Motor Carriers Cases 223, as holding that under a similar lease agreement the shipper was a private carrier. That case is clearly distinguishable from the facts in the present case. The important distinctions are as follows:

1. Even though the lessor and the driver were the same person, the compensation was separated. A payment of 10c a road mile was paid for the use of the vehicle while the drivers were paid an additional amount based upon a mileage basis.

2. The equipment was leased on a yearly basis while the drivers were hired on a weekly basis.

3. The Company and not the driver-owner paid Social Security taxes and unemployment insurance. The Company also deducted withholding taxes from the driver-owner's wages.

The above distinctions are clearly important in determining whether or not the driver is in fact an employee or a lessor.

The petitioners attempted in the lower Court proceeding to justify the arrangement between themselves purportedly on the ground that a former representative of the Interstate Commerce Commission acquiesced in the agreement. A comparable situation existed in No. MC-C-1507 *Walsh Freight Lines, Inc.* v. *F. & M. Lines,* reported in 10 FCC par. 33, 236 where it was held that one who fails to obtain a formal ruling on such a question from the Interstate Commerce Commission acts at his own peril in relying on an informal opinion. At the hearing below, a representative of the petitioners admitted that the Interstate Commerce Commission had written a letter to the Company to the effect that the operation was in violation of their rules (T.118). This also clearly reflects that there is no validity to petitioners' argument that the Arkansas Supreme Court's holding conflicts with the Federal Law. In fact, it is obvious that Woodard clearly is a contract carrier under either State or Federal Law.

III

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

The legal questions presented by the petition are the same as those raised in *Fry Roofing Co.* v. *Woods, supra,* that is, what evidence is necessary to sustain a State Court holding and whether the Arkansas Statutes and enforcement thereof constitute an undue burden on Interstate Commerce. These questions were determined in that case and nothing would be gained by this Court reviewing this case. In fact, petitioner does not argue that any new legal questions are present in this case. Rather,

they contend that the distinction between this case and the *Fry Case* is factual, thus, the Respondents contend no real reason exists for Certiorari.

The decision below turns upon its own facts and will affect few others except the litigants. The Company in this case frankly admitted that the lease agreement was conceived to allow its Company to achieve purely personal benefits. It was their idea that if the driver was the owner of the equipment, he would take better care of the equipment and also decrease costs of operations, thus, they attempted to make him a self-employed person. In fact, they specified in the agreement that he would have to pay his own self-employment tax. Nowhere in the agreement is the word employee used. It was not until after Woodard was arrested in Arkansas that they endeavored to distort and twist the lease agreement so as to attempt to convert it to an employer-employee relationship. It is clear that they wished the benefits of a contract carrier relationship and also the benefits of an employee relationship without the detriments of either, which is a legal impossibility. In other words, this arrangement and questions presented are based upon special circumstances and probably will never rise again. Furthermore, no legal questions are raised that have not already been decided by this Court.

CONCLUSION

The decision of the Supreme Court of Arkansas is based upon uncontroverted factual foundation; petitioners' position is nothing more than an attempt to cause this honorable Court to again consider substantially similar facts and issues to those raised and resolved by it in *Fry Roofing Co.* v. *Wood,* 244 U.S. 157, 97 L. Ed. 168, 73 S. Ct. 204; petitioners' contentions are plainly unsubstantial; and the writ of certiorari should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify I have on May 17, 1957, served a copy of the foregoing Brief on all Attorneys of Record in this proceeding.

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